UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *Plaintiff*, v. CITY OF SEATTLE *et al.* *Defendants*.	Case No. 2:17-cv-00370 PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION **ORAL ARGUMENT REQUESTED** **TEMPORARY RESTRAINING ORDER NOTED ON CALENDAR: MARCH 9, 2017** **PRELIMINARY INJUNCTION NOTED ON CALENDAR: MARCH 31, 2017**

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Plaintiff Chamber of Commerce of the United States of America hereby moves for a temporary restraining order and/or a preliminary injunction enjoining Defendants (collectively, the "City") from implementing or enforcing Seattle Ordinance No. 124968 pending final judgment in this case. The Chamber asks the Court to enter this order by April 3, 2017. To maintain the status quo, the Chamber requests that this Court at a minimum temporarily enjoin the Ordinance pending briefing and resolution of this motion. Unless enjoined, on April 3 the Ordinance will require certain Chamber members to disclose the confidential information of for-hire drivers who contract with them, causing irreparable harm.

INTRODUCTION

In less than four weeks, the Ordinance will, absent prompt judicial intervention, wreak irreparable harm that threatens the very existence of the for-hire and rideshare transportation system in western Washington through compulsory production of confidential, trade secret information and forced compliance with a novel regulatory scheme that is preempted by federal antitrust and labor law. The Ordinance should be enjoined before it ever goes into effect.

For-hire drivers are independent contractors who connect with passengers through a ride-referral service, *e.g.*, a dispatch center or smartphone application ("app"), provided by a third-party company, known under Seattle law as a driver coordinator. Out of step not only with well-settled principles of antitrust and labor law but also with municipalities around the country, the City attempts to treat these independent contractors as if they were employees of the driver coordinators with whom they contract. Specifically, the City's one-of-a-kind ordinance authorizes drivers to unionize and collude through collective bargaining over the price terms of their contracts with driver coordinators. The Ordinance turns labor law on its head, treating independent businesses as employees, and flouts antitrust law, allowing independent economic actors to fix prices. As such, the Ordinance is preempted by both the Sherman Act and the National Labor Relations Act.

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On March 7, 2017, Teamsters Local 117 demanded that Chamber members Uber, Lyft, and Eastside turn over—by April 3, 2017—their confidential list of contracted drivers (including personal identifying information) so the Teamsters can attempt to unionize these independent contractors. The Chamber satisfies all the criteria for obtaining an order to preserve the status quo while the Court adjudicates the merits. First, the Chamber is likely to succeed on its claims that the Ordinance is preempted by federal antitrust and labor law. Second, Chamber members will suffer irreparable harm by being forced to comply with a preempted law, disclose confidential information, and incur costs and expenses not fully compensable by money damages. Third, the balance of hardships sharply favors the Chamber and its members, especially given the City's prior successful efforts to block an earlier, unaccelerated adjudication of this controversy. Finally, the public interest supports the issuance of preliminary relief.

BACKGROUND

A. Ride-Referral And Dispatch Services In Seattle

For-hire drivers must connect with riders. Traditionally, drivers relied upon street hails, taxi stands, or a physical dispatch service. Taxicab associations and limousine companies often maintain dispatch centers where riders call to request service that is provided by affiliated drivers. Chamber member Eastside for Hire, Inc. ("Eastside") is a traditional dispatch service that contracts with drivers to provide ride-referral services. *See* Decl. of Bashi Katar ¶ 5. The company uses advertising and a client base to generate passenger transportation requests by telephone or email, and refers the requests to drivers using a mobile data terminal. *Id.* ¶ 6. The drivers are independent contractors, not Eastside employees. *Id.* ¶ 8.

The smartphone made possible a new type of ride-referral system. Digital ride-referral applications allow a potential rider to communicate her location through a smartphone, and for computer systems to match that rider with an available driver who is nearby. Prominent examples are the "Uber App," and the "Lyft App," developed by Chamber members Uber Technologies, Inc. (with its subsidiaries, "Uber") and Lyft respectively. *See* Decl. of Brooke

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Steger. ¶ 3; Decl. of Todd Kelsay ¶ 4. Local transportation providers contract with Uber or Lyft (or both) to use the respective App for transportation requests and fare-payment-processing services, in exchange for paying a service fee. Steger Decl. ¶¶ 3, 8–10; Kelsay Decl. ¶¶ 5–7. All drivers who use the Uber and Lyft Apps are independent contractors, and neither Uber or Lyft employs drivers or operates commercial vehicles. Steger Decl. ¶¶ 14–15; Kelsay Decl. ¶¶ 8, 10.

B. The Ordinance

Professing concern about the impact on driver earnings of increased competition in the for-hire transportation market, and incorrectly viewing the relationship between driver coordinators and drivers as akin to that of employer and employees, Seattle Council members enacted Ordinance 124968. The Ordinance requires "driver coordinators" to collectively bargain with "for-hire drivers." Ordinance § 1(I). A "driver coordinator" is "an entity that hires, contracts with, or partners with for-hire drivers" to assist them in "providing for-hire services to the public." Ordinance § 2. The Ordinance applies only to drivers who contract with a driver coordinator "other than in the context of an employer-employee relationship," *id.* § 3(D)—*i.e.*, to independent contractors—and gives them the power to unionize and collectively bargain as if they were employees under the federal labor laws.

The collective-bargaining process begins when a union applies to be a "Qualified Driver Representative" (QDR) to the City's Director of Finance and Administrative Services (Director). *Id.* § 3(C). Once the Director approves a QDR, any driver coordinator that contracts with "50 or more for-hire drivers in the 30 days prior to the [Ordinance's] commencement date" must, at the demand of a QDR, disclose "within 75 days of the commencement date" the names, addresses, email addresses, phone numbers, and driver license numbers of "all qualifying drivers they hire, contract with, or partner with." *Id.* § 3(D); Director's Rule FHDR-1, http://bit.ly/2mphh8s. The QDR contacts those drivers, and if a majority consent to the QDR's exclusive representation, the Director must certify it as the "Exclusive Driver Representative" (EDR) "for all drivers for that particular driver coordinator." *Id.* § 3(F)(2). This designation prevents the driver coordinator

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from doing business with any drivers who do not wish to be represented by, or to work under the terms negotiated by, the EDR. *Id.* § 2.

Once an EDR is certified, the driver coordinator must meet with it to negotiate over various subjects, including the "payments to be made by, or withheld from, the driver coordinator to or by the drivers," and "minimum hours of work." *Id.* § 3(H)(1). The Director does not participate in the negotiation but merely determines whether to approve any agreement as consistent with City policy. *Id.* § 3(H)(2)(c). If the coordinator and union do not reach agreement, the matter goes to binding arbitration, and the arbitrator submits what he believes is "the most fair and reasonable agreement" to the Director for approval. *Id.* § 3(I)(1)–(4).

C. Prior Litigation

This Court dismissed without prejudice the Chamber's prior suit challenging the Ordinance, accepting the City's argument that the case was not ripe because no QDR had yet sought designation or demanded driver lists. *See* No. 2:16-cv-00322, Doc. 63 at 8 (W.D. Wash. Aug. 9, 2016). The Chamber had opposed dismissal in part because, under the Ordinance's compressed timetable, waiting until a QDR has demanded driver lists would needlessly force the Chamber to seek injunctive relief on an expedited basis. *Id.*, Tr., Doc. 60, at 12 (Aug. 3, 2016).

D. Implementation Of The Ordinance And Recent Developments

Soon after the Court dismissed the Chamber's complaint, the City Council set January 17, 2017, as the Ordinance's commencement date. *See* Seattle Ordinance No. 118793, http://bit.ly/2jRlaP1. On March 3, 2017, the City designated Teamsters Local 117 as a QDR. The Teamsters notified Uber, Lyft, and Eastside on March 7, 2017, that it intends to become the EDR of all drivers who contract with those companies, and demanded that each company turn over its confidential driver information. Kelsay Decl. ¶ 12; Steger Decl. ¶ 17; Katar Decl. ¶12 . These companies keep this information strictly confidential and maintain it as a trade secret. Kelsay Decl. ¶ 13–17; Steger Decl. ¶ 17; Katar Decl. ¶12.] Uber, Lyft, and Eastside now have until April 3, 2017, to disclose that information to the Teamsters. Ordinance § (3)(D).

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ARGUMENT

Because it authorizes independent contractors to form unions and fix prices, the Ordinance is preempted by both antitrust and labor laws. If not enjoined, the Ordinance will cause severe and uncompensable injury to the Chamber's members. This is therefore a classic case for injunctive relief: a likelihood of success on the merits, coupled with irreparable harm.

A plaintiff is entitled to a preliminary injunction if (1) "he is likely to succeed on the merits," (2) he "is likely to suffer irreparable harm" absent preliminary relief, (3) "the balance of equities tips in his favor," and (4) an "injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). These factors interrelate on a "sliding scale"; if the "balance of hardships … tips sharply towards the plaintiff" (and the other factors are satisfied), an injunction should issue if there are "serious questions going to the merits." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011); *accord Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 411 (9th Cir. 2015). The standard for a temporary restraining order is "substantially identical." *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 389 n.7 (9th Cir. 2001). These factors favor granting an injunction here.

I. THE CHAMBER IS LIKELY TO SUCCEED ON THE MERITS

A. The Sherman Act Preempts the Ordinance

Absent state-action immunity, federal antitrust law preempts municipal laws that mandate or authorize private parties to commit "*per se* violation[s]" of the Sherman Act. *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982). The Ordinance does that by authorizing for-hire drivers who are independent contractors to form unions and collectively bargain over the price terms of their contracts with driver coordinators. This is horizontal price-fixing—a classic *per se* antitrust violation. The Supreme Court has repeatedly affirmed that the antitrust laws prohibit independent contractors from forming or joining unions to collectively bargain, and the Federal Trade Commission has consistently maintained that state and local enactments authorizing collective bargaining by independent contractors violate the antitrust laws.

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The Ordinance is therefore preempted unless Defendants can establish an entitlement to state-action immunity. This doctrine allows a municipality to mandate or authorize a violation of the antitrust laws if the challenged conduct is "clearly articulated and affirmatively expressed as state policy" and is "actively supervised by the State." *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013). But the Ordinance satisfies neither condition, because state law nowhere expresses a policy of permitting collective bargaining by for-hire drivers, and no state official (nor even any City official) actively supervises the collective-bargaining process.

1. The Ordinance Authorizes Price Fixing, A *Per Se* Antitrust Violation

The Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. Certain collusive practices are condemned as *per se* violations, which means that they are unlawful on their face, without the need for a factfinder to decide whether they are reasonable under the circumstances. *Ariz. v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 342–48 (1982). "Foremost in the category of per se violations is horizontal price fixing among competitors"—*i.e.*, agreements among competitors to establish the price to be paid for a good or a service. *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 986 (9th Cir. 2000). And when a *per se* violation occurs, "there is no need to define a relevant market or to show that the defendants had power within the market." *Id.*

These prohibitions on price fixing apply to efforts by individual independent contractors to join or form unions to collectively bargain with companies over prices for goods and services. For example, independent grease peddlers violated the Sherman Act by joining a union and collectively bargaining over the price at which they would resell restaurant grease to grease processors. *See L.A. Meat & Provision Drivers Union v. United States*, 371 U.S. 94, 96–98 (1962). Independent fishermen violated the Sherman Act by forming a union and collectively bargaining about the terms and conditions under which they would sell fish to processors and canneries. *See Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143, 144–46 (1942). And independent "stitching contractors" violated the Sherman Act by forming a union and

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collectively bargaining over the provision of stitching services to clothing sellers. *See United States v. Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 463–64 (1949).

The FTC has consistently relied on these principles to condemn collective-bargaining measures similar to the Ordinance on the grounds that "collective bargaining over prices amounts to *per se* illegal price fixing." Letter to Wash. H. Rep. Brad Benson 5 (Feb. 8, 2002), http://bit.ly/2lsuMQP. For instance, the FTC concluded that Washington State legislation authorizing physicians to collectively bargain with health insurers would permit "precisely the sort of conduct" that is a *per se* antitrust violation: horizontal price fixing. *Id.* at 2. The FTC reaffirmed this position when it opposed an Ohio bill allowing home health-care providers to collectively bargain over insurance reimbursements. Letter to Ohio H. Rep. Dennis Stapleton 7 (Oct. 16, 2002), http://bit.ly/2lsvRrT. And the FTC has reiterated this in congressional testimony. *See, e.g.*, Testimony of David Wales 7 (Oct. 18, 2007), http://bit.ly/2m9Pady.

The Ordinance undeniably authorizes *per se* illegal conduct. It allows for-hire drivers who are independent contractors to join together in a union (the EDR) and, through the union, to agree with one another on, and collectively bargain over, the price terms of their contracts with the driver coordinators. Ordinance § 3(H)(1). Like the illegal grease peddlers' union in *Los Angeles Meat & Provision Drivers Union*, the illegal fishermen's union in *Columbia River Packers Ass'n*, the illegal stitchers' union in *Women's Sportswear*, and the physicians' and home-health-care workers' unions condemned by the FTC, this "collective bargaining over prices amounts to *per se* illegal price fixing."[1]

2. The State-Action Doctrine Does Not Apply

Because the Ordinance authorizes *per se* illegal conduct, it is preempted, *see Rice*, 458 U.S. at 661, unless the City demonstrates that the conduct at issue is entitled to state-action

[1] Because the antitrust laws apply to price fixing by sellers *and* buyers, *Knevelbaard Dairies*, 232 F.3d at 986, it is *per se* illegal price fixing whether characterized as an agreement over the price drivers pay coordinators to use a ride-referral service (*see* Steger Decl. ¶ 3; Guled Decl. ¶ 4), or the price coordinators pay drivers to provide driving services.

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immunity. The City's transparent effort to cloak the Ordinance's price-fixing scheme with the imprimatur of state action fails. Under the state-action doctrine, States are immune from antitrust liability when acting in their sovereign capacity. *See Parker v. Brown*, 317 U.S. 341 (1943). In contrast, non-state actors carrying out a State's regulatory program may claim state-action immunity only by satisfying a "rigorous two-pronged test." *Patrick v. Burget*, 486 U.S. 94, 100 (1988). Their challenged conduct is immune only if it is both (1) "clearly articulated and affirmatively expressed as state policy," and (2) "actively supervised by the State." *Phoebe Putney*, 133 S. Ct. at 1010. These requirements must be narrowly applied, for "state-action immunity is disfavored." *Id.* (quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992)). If the otherwise unlawful conduct the Ordinance authorizes fails to satisfy either of these requirements, the Ordinance is preempted. Neither requirement is satisfied here.

(a) The Ordinance fails the clear-articulation requirement

i. To prove that anticompetitive conduct is clearly articulated and affirmatively expressed, the City must demonstrate that the state explicitly authorized the specific conduct in question. *See Columbia Steel Casting Co. v. Portland Gen. Elec. Co.*, 111 F.3d 1427, 1441 (9th Cir. 1996). A mere "inference" that the state intended to approve the conduct is insufficient; there must be a "forthright and clear statement." *Id.* at 1439. Moreover, "state-law authority to act is [alone] insufficient to establish state-action immunity"; the City must also show that an "anticompetitive effect was the 'foreseeable result' of what the State authorized" the municipality to do. *Phoebe Putney*, 133 S. Ct. at 1011–12; *see also Columbia Steel*, 111 F.3d at 1444. A particular anticompetitive effect is not foreseeable unless the State "affirmatively contemplated" that the municipality would displace competition in a specific way, *Phoebe Putney*, 133 S. Ct. at 1011, and contemplated "the kind of actions alleged to be anticompetitive," *Springs Ambulance Serv. v. City of Rancho Mirage*, 745 F.2d 1270, 1273 (9th Cir. 1984). These standards must be rigorously applied because "a broad interpretation of the doctrine may

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inadvertently extend immunity to anticompetitive activity which the states did not intend to sanction." *Cost Mgmt. Servs., Inc. v. Wash. Nat. Gas Co.*, 99 F.3d 937, 941 (9th Cir. 1996).

In *Phoebe Putney*, for example, the Supreme Court considered whether a state statute clearly articulated and affirmatively expressed a state policy allowing a municipal hospital authority to acquire a private competitor in a transaction that would violate the antitrust laws. The statute at issue authorized the municipal hospital authority to exercise a broad range of powers, including the express power "to acquire" other hospitals. 133 S. Ct. at 1007–08 (quotations and brackets omitted). Even this was insufficient to authorize the merger, the Court unanimously concluded, because although the statute authorized hospital acquisitions generally, it did not "clearly articulate and affirmatively express" a specific policy of allowing acquisitions "that will substantially lessen competition." *Id.* at 1012. And in *Columbia Steel*, the Ninth Circuit held that a state agency's order approving an exchange of facilities by two electric utilities to eliminate duplication within given service areas did not immunize the utilities from claims that the utilities had unlawfully divided the market, because, even though the exchange may have been "as a practical matter, the factual equivalent of an allocation of exclusive service territories," the order "did not specifically and clearly authorize . . . a division of the . . . market into exclusively served territories." 111 F.3d at 1441 (quotations and brackets omitted).

ii. Here, as in *Phoebe Putney* and *Columbia Steel*, the general authorizations of Washington state law fall far short of expressly authorizing the challenged conduct or affirmatively contemplating that the City would displace competition in the specific manner that it did. No provision of state law even arguably authorizes municipalities to regulate "the nature and amount of payments" between for-hire drivers and driver coordinators, Ordinance § 3(H)(1), let alone to permit those payments to be set through a *per se* anticompetitive collective-bargaining process. Indeed, the Washington statutory provisions cited in the Ordinance, *see* Ordinance § 1, do not even mention driver coordinators or collective bargaining, but instead

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merely give municipalities a degree of general regulatory authority over persons and businesses providing for-hire transportation services. *See* RCW 46.72.160(1)–(6).

For example, the statute grants municipalities the power to "control[] the rates charged" and "the manner in which rates are calculated and collected." RCW 46.72.160(3). But this refers to the rates or fares that drivers charge to *passengers*, not to any payments between drivers and driver coordinators. And it certainly says nothing about fixing prices through collective bargaining. Other provisions authorize municipalities to "[e]stablish[] safety and equipment requirements," and "[a]ny other requirements adopted to ensure safe and reliable for hire vehicle transportation service." RCW 46.72.160(5), (6). Again, these provisions apply to transportation providers, not ride-referral companies, and they say nothing about either collective bargaining or payments between drivers and driver coordinators.

The statutory provision expressing "the intent of the legislature to permit political subdivisions of the state to regulate for hire transportation services without liability under federal antitrust laws" (RCW 46.72.001) does not alter this result. This statement appears in the statute's prefatory "Finding and intent" provision, and thus demonstrates only that the State contemplated antitrust immunity to the extent that municipalities enact the sorts of regulations specifically enumerated in the statute's operative provision, RCW 46.72.160. Thus, this provision might be sufficient to confer antitrust immunity on a municipal fare schedule promulgated pursuant to the power to "[c]ontrol[] . . . rates" charged to passengers. But it is plainly insufficient to immunize the City's delegation to private drivers the power to fix the price of a ride-referral service between themselves and driver coordinators through an anticompetitive collective-bargaining process. After all, "the authorization of discrete forms of anticompetitive conduct pursuant to a regulatory structure[] does not establish that the State has affirmatively contemplated other forms of anticompetitive conduct that are only tangentially related." *Phoebe Putney*, 133 S. Ct. at 1016; *see also Medic Air Corp. v. Air Ambulance Auth.*, 843 F. 2d 1187,

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1189 (9th Cir. 1988) (state-action immunity for monopoly provider of air-ambulance *dispatching* did not extend to dispatcher's anticompetitive conduct in providing air-ambulance *services*).

iii. Defendants cannot save the Ordinance by referring to language in its preamble and findings stating that the Ordinance is within the City's power to "ensure safe and reliable for hire vehicle transportation services" because the City assumes drivers who secure better payment terms from driver coordinators will be more satisfied with their economic situations and hence likelier to provide safer and more reliable service. The City's rationale makes no sense. For immunity to apply, the state legislature must have made a "forthright and clear statement" authorizing the conduct, *Columbia Steel*, 111 F.3d at 1439, and must have affirmatively "contemplated the kind of actions alleged to be anticompetitive," *Springs Ambulance*, 745 F.2d at 1273. The City's transparent end-run around the "clear articulation" requirement fails because a clear statement is entirely lacking, and because the legislature could hardly have contemplated that its authorization to regulate safety and reliability would be used to regulate payments between drivers and driver coordinators, let alone to delegate to drivers the power to fix the prices of those payments through anticompetitive collective bargaining. If, as in *Phoebe Putney*, the power to acquire hospitals does not include the power to acquire hospitals anticompetitively, then the power to regulate safety and reliability certainly does not include the power to authorize private parties to engage in horizontal price fixing.

The FTC has consistently rejected, in similar contexts, efforts to disguise collective bargaining regimes as safety regulations. As the agency explained in testimony before Congress, collective bargaining cannot "solve issues regarding the ultimate safety or quality of products or services that consumers receive." Testimony of David Wales, at 8 (Oct. 18, 2007), http://bit.ly/2m9Pady . We do not, for example, "rely on [unions] to bargain for safer, more reliable, or more fuel-efficient cars." *Id.* Rather, "[c]ollective bargaining rights are designed to raise the incomes and improve the working conditions of union members," not to "ensure the safety or quality of products or services." *Id.*

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At bottom, the City seeks to fundamentally alter the status of independent drivers by enabling them to form drivers' unions and bargain for wages like employees. The state legislature plainly did not "affirmatively contemplate" such a sea change merely by authorizing municipalities to ensure "safe and reliable" transportation service. Just as Congress does not "hide elephants in mouseholes," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), the state legislature does not hide collective-bargaining regimes in safety regulations.

(b) The Ordinance fails the active-supervision requirement

The collective-bargaining regime also fails the "active supervision" requirement. The government cannot simply delegate to private parties the task of implementing an anticompetitive program; rather, it must be "implemented in its specific details" "by the State." *Ticor Title*, 504 U.S. at 633. "Actual state involvement, not deference to private price-fixing arrangements . . . is the precondition for immunity." *Id.* This requirement ensures that "the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties." *Id.* at 634–35. The ultimate question is whether the anticompetitive prices come from private parties or are instead of "the State's own" devising. *Id.* at 635.

Under the Ordinance, collective bargaining is a private process; the Director's only role is to approve or disapprove an agreement submitted to him after the parties (or an arbitrator) have agreed to terms. *Supra* p. 4. This rubber-stamp review is not "active supervision" by the State.

As an initial matter, the Director is not a state official; he is a municipal one. But "where state *or municipal* regulation [of] a private party is involved . . . active *state* supervision must be shown." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 n.10 (1985) (emphasis added); *see also Patrick*, 486 U.S. at 101 ("the active supervision requirement mandates that *the State* exercise ultimate control" (emphasis added)); *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) ("the policy must be 'actively supervised' by the State itself"). Municipalities are *not* substitutes for States and cannot simply step into the shoes of the

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State for purposes of state supervision—they "are not beyond the reach of the antitrust laws . . . because they are not themselves sovereign." *Town of Hallie*, 471 U.S. at 38. The absence of any involvement by state officials deprives Defendants of antitrust immunity.[2]

Even if a municipal official can fulfill the *state*-supervision requirement, the Director's role under the ordinance is insufficient because he does not participate in collective bargaining itself. He has only a veto power, and no independent authority to specify the terms of a collective-bargaining agreement. Absent that authority, the Director is insufficiently involved "in the mechanics" of the anticompetitive price fixing scheme, *Ticor*, 504 U.S. at 633, and the arrangement cannot be considered "the State's own," *id.* at 635. State-action immunity therefore cannot shield the Defendants' collective-bargaining regime from scrutiny under the Sherman Act, as the collective-bargaining scheme "is really a private price-fixing conspiracy, concealed under a gauzy cloak of state involvement." *Fisher v. City of Berkeley*, 475 U.S. 260, 269 (1986).

B. The National Labor Relations Act Preempts the Ordinance

The National Labor Relations Act ("NLRA") governs employees' rights to bargain collectively with their employer and proscribes as unfair labor practices certain activities by both employers and labor organizations. *See* 29 U.S.C. §§ 157, 158. The NLRA preempts the Ordinance in two ways: *first*, by regulating activities—agreements between businesses and independent contractors—that the statute leaves "unregulated" and subject to the "free play of economic forces," *Machinists v. Wis. Emp't Relations Comm'n*, 427 U.S. 132, 140 (1976) ("*Machinists* preemption"), and, *second*, by impermissibly injecting local officials and state courts into matters—determining whether for-hire drivers are "employees" under the NLRA—that are subject to the NLRB's exclusive jurisdiction, *see San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959) ("*Garmon* preemption").

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[2] Some courts have assumed that municipal supervision of private parties is sufficient, but the issue was not squarely raised or decided in those cases. *See, e.g., Tom Hudson & Assocs., Inc. v. City of Chula Vista*, 746 F.2d 1370, 1374 (9th Cir. 1984).

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1. The Ordinance Is Preempted Under *Machinists*

(a) Congress intended that independent contractors remain unregulated

Machinists preemption precludes state and local governments from enforcing laws regulating conduct that Congress intended remain unregulated and "controlled by the free play of economic forces." *Machinists*, 427 U.S. at 140; *Chamber of Commerce v. Brown*, 554 U.S. 60, 65 (2008). "'An appreciation of the true character of the national labor policy expressed in the NLRA'" indicates that "Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes that would be upset if a state could also enforce statutes or rules of decision resting upon its views concerning accommodation of the same interests." *Machinists*, 427 U.S. at 140 n.4 (quotations omitted). Accordingly, state and local governments may not regulate "within a zone protected and reserved for market freedom" by the NLRA. *Brown*, 554 U.S. at 66.

The statutory text, purpose, history, and structure of the NLRA all demonstrate that Congress excluded independent contractors from unionization and collective-bargaining schemes—state and federal—rather than allow municipalities to set up their own regulatory programs. Congress expressly excluded "any individual . . . having the status of an independent contractor" from the definition of "employee." 29 U.S.C. §152(3). This reflects Congress's intent to ensure that the relationships between independent contractors and those with whom they do business remain regulated by "the free play of economic forces," or market forces.

Requiring independent contractors to collectively bargain is also inconsistent with the fundamental purpose of labor regulation under the NLRA. The Supreme Court "[l]ong ago . . . stated the reason for labor organizations," explaining that "they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; [and] that, if the employer refused to pay him the wages that he thought fair, he was nevertheless

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unable to leave the employ and resist arbitrary and unfair treatment." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937). These rationales do not apply to independent contractors, who do not depend on an employer for a daily wage. Instead, independent contractors boast the "ability to operate an independent business and develop entrepreneurial opportunities." *NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1098 (9th Cir. 2008). They are "free to work or not work . . . when they choose; they may 'moonlight' by working for other [companies]; [and] they are free to make their own arrangements with clients and to develop their own goodwill." *Id.* (quotations omitted). They enjoy the opportunity for profit and related upsides of a successful business, but they also bear the risk of loss if the venture fails to thrive as planned. *Id.* Collective-bargaining schemes designed to protect economically dependent employees and guarantee stability do not translate to the entrepreneurial world of independent contractors, who are risk-taking businesspersons striving to profit in the free market.

The history of the NLRA's independent-contractor exclusion strongly suggests that Congress meant to exclude independent contractors from both federal and state collective-bargaining regimes. As originally enacted in 1935, the NLRA (also known as the Wagner Act) did not expressly exclude independent contractors from its list of covered "employees." *See NLRB v. Hendricks Cty. Rural Elec. Membership Corp.*, 454 U.S. 170, 177–78 (1981). The Supreme Court broadly interpreted the term "employee," holding that "newsboys" qualified even thought they would likely be independent contractors under common-law standards. *NLRB v. Hearst Publ'ns*, 322 U.S. 111, 120, 130–31 (1944). "The mischief at which the Act [was] aimed," the Court reasoned, was not "confined exclusively to 'employees' within the traditional legal distinctions separating them from 'independent contractors.'" *Id.* at 126.

"Congressional reaction to this construction of the Act was adverse." *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968). Congress passed the Taft-Hartley Act of 1947, Pub. L. No. 80–101, 61 Stat. 136, which amended the NLRA to "specifically exclud[e] 'any individual having the status of an independent contractor' from" the Act's "definition of 'employee.'"

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United Ins. Co. of Am., 390 U.S. at 256. The House Report emphasized that "there has always been a difference, and a big difference, between 'employees' and 'independent contractors'":

> "Employees" work for wages or salaries under direct supervision. "Independent contractors" undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits.

H.R. Rep. No. 80-245, at 18 (1947). These fundamental differences between employees and independent contractors are the reason Congress excluded independent contractors from the NLRA's coverage. Because Congress intended independent contractors to remain free from the strictures of collective bargaining, it quickly "correct[ed]" their inclusion in the NLRA's collective-bargaining regime. *Id.* This legislative history confirms that Congress never intended to subject independent contractors to the collective-bargaining process that governs employees; rather, Congress intended that independent contractors remain free to operate as entrepreneurs, unregulated by federal or state collective-bargaining laws.

The NLRA's exemption for "any individual employed as a supervisor" reinforces this conclusion. 29 U.S.C. § 152(3). The Supreme Court has interpreted the supervisor exemption broadly to preempt state labor laws relating to supervisors, and a collective-bargaining scheme for supervisors would clearly be preempted. *Beasley v. Food Fair of N.C., Inc.*, 416 U.S. 653, 662 (1974). Congress exempted both supervisors and independent contractors at the same time in the Taft Hartley Act, 61 Stat. 136–37, 29 U.S.C. § 152(3), and the two parallel exemptions "should be read *in pari materia*" and interpreted to have the same scope. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 138 n.11 (1985). Not only were the exemptions enacted together, but Congress's reasoning for exempting supervisors applies with greater force to independent contractors: they "have demonstrated their ability to take care of themselves without depending upon the pressure of collective action" and "have abandoned the 'collective security' of the rank and file voluntarily, because they believed the opportunities thus opened to them to be more valuable" than the benefits of employment. H.R. Rep. No. 80-245, at 17.

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Both supervisors and independent contractors differ from other categories of individuals whom Congress excluded from the NLRA's definition of employee: public employees, agricultural workers, and domestic workers. Unlike independent contractors, these groups are traditional "employees," but were excluded from the Act's coverage when the NLRA was first enacted, 49 Stat. 450, for very different reasons than independent contractors were later excluded. The decision not to regulate the relationships between state and local governments and their employees respects principles of federalism and otherwise reflects a sound congressional choice to refrain from inserting the federal government between a state or local government and its employees. *See Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 181 (2007) ("The [NLRA] leaves States free to regulate their labor relationships with their public employees."). And Congress was simply indifferent about agricultural workers and domestic employees, excluding them because the NLRA was meant to cover "only those disputes which are of a certain magnitude and which affect commerce." S. Rep. No. 79-1184, at 3 (1934). Unlike independent contractors or supervisors, there is no indication that Congress intended to create national labor policy for these groups, and states remain free to "apply their own views of proper public policy to the collective bargaining process insofar as it is subject to their jurisdiction." *United Farm Workers of Am. v. Ariz. Agric. Emp't Relations Bd.*, 669 F.2d 1249, 1257 (9th Cir. 1982).

By contrast, Congress voiced significant concerns when the Supreme Court interpreted the NLRA to include independent contractors, because they are fundamentally different from employees. Unlike employees, they do not work under the control of others; they work for themselves and, indeed, may be deemed *employers* under the NLRA. *See* The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act, 6th Edition, p. 2441, Bloomberg BNA (database updated 2015) ("Although independent contractors are not covered by the Act as *employees*, they are covered as *employers* when they fall within the definition of 'employer' contained in Section 2(2)."). Their contractual arrangements have traditionally been governed by market forces, and by excluding them from the NLRA, Congress intended for those

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arrangements to remain regulated, if at all, only by "the free play" of those forces. Because it imposes disclosure obligations, union organizing, and collective bargaining on independent contractor relationships, which the NLRA leaves unregulated, the Ordinance is preempted.

If the City implements and enforces the Ordinance, other local governments may also seek to regulate collective bargaining for for-hire drivers. Subjecting independent-contractor relationships to thousands of different bargaining schemes is contrary to congressional intent in enacting the NLRA to leave these relationships unregulated. *See Brown*, 554 U.S. at 73–74; *Golden State Trans. Corp. v. City of Los Angeles*, 475 U.S. 608, 613 (1986); *Machinists*, 427 U.S. at 139. Doing so would be particularly chaotic for Chamber members who operate across the country, but would be problematic even for those operating in a more restricted geographic area, who may be forced to follow different rules in Seattle than Tacoma. The NLRA was enacted to eliminate, rather than impose, such significant burdens on commerce. *See Brown*, 554 U.S. at 76 (Congress, unlike the states, can create exceptions to federal policy "in a manner that preserves national uniformity without opening the door to a 50-state patchwork of inconsistent labor policies"); *Garmon*, 359 U.S. at 242 ("Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency"); *Hearst*, 322 U.S. at 123 ("The [NLRA] is federal legislation, administered by a national agency, intended to solve a national problem on a national scale."), *abrogated in part on other grounds by United Ins. Co. of Am.*, 390 U.S. 254.

Finally, the sheer novelty of the City's attempt to regulate independent contractors should raise red flags. Plaintiff is unaware of any other state or local law authorizing independent contractors to collectively bargain; the City's theory is unprecedented. Given the many decades of union efforts to organize various types of workplaces, including multiple efforts to claim that individuals working as independent contractors are actually employees, it is implausible that unions have inexplicably ignored for decades a prime opportunity to expand their membership. *Cf. Util. Air Regulatory Gr. v. EPA*, 134 S. Ct. 2427, 2444 (2014) ("When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the

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American economy, we typically greet its announcement with a measure of skepticism.").

(b) The Ordinance imposes requirements that conflict with the NLRA's comprehensive scheme

Machinists preemption applies here for a second, independent reason. Congress has explicitly left unregulated both the substantive terms of collective bargaining agreements and each side's use of economic leverage in bargaining. *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 485–89 (1960). The Ordinance regulates both.

The Ordinance permits the City to influence the substantive terms of the parties' agreements in two ways. First, if the parties fail to reach agreement within ninety days, the Ordinance permits either party to have an arbitrator decide the contract's terms. Ordinance § 3(I). Second, the Ordinance requires the Director to review and approve all collective-bargaining agreements. *Id.* § 3(H)(2). The agreement is not effective until the Director approves it, and he may withdraw approval if an agreement no longer satisfies specified conditions. *Id.* § 3(H)(2)(c); (J)(1). These provisions directly contradict Congress's instruction that the parties to a collective-bargaining agreement "should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences." *Ins. Agents' Int'l Union*, 361 U.S. at 488. Thus, while the NLRA regulates the *subjects* over which the parties must bargain, 29 U.S.C. § 158(d), "labor policy is not . . . erected on a foundation of government control of the results of negotiations," and it does not allow government to "act at large in equalizing disparities of bargaining power between employer and union." *Ins. Agents*, 361 U.S. at 490. Yet that is precisely what the Ordinance attempts to do; it allows an arbitrator to impose agreement terms at the request of only one party after that party has proven it lacks the bargaining power to obtain desired terms on its own. And it allows the City to regulate the "substance of the [parties'] agreement" by giving the Director veto power over the parties' negotiated terms. Ordinance § 3(H)(2). While the Director has very limited authority under this scheme, the authority that he does have conflicts with the NLRA's intention to leave the

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substantive terms of the parties' agreement regulated only by the free play of economic forces.

The Ordinance's interest-arbitration provision also conflicts with the NLRA in another, independent way. By requiring the parties to submit to arbitration, the Ordinance restricts each side's use of traditional tools of economic leverage. *See* Ordinance, § 3(I); *see also id.* § 3(K) (prohibiting driver coordinators from taking certain measures in response to driver actions). These requirements directly conflict with the NLRA, which states that a party's obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d). It also conflicts with the recognition that "[t]he presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the [NLRA] [has] recognized." *Ins. Agents' Int'l Union*, 361 U.S. at 489. "To sanction state regulation of such economic pressure deemed by the federal Act desirably left for the free play of contending economic forces, is not merely to fill a gap by outlawing what federal law fails to outlaw; it is denying one party to an economic contest a weapon that Congress meant him to have available." *Machinists*, 427 U.S. at 150. "Accordingly, such regulation by the State is impermissible because it stands as an obstacle to the accomplishment and execution" of congressional objectives. *Id.* at 150–51.

2. The Ordinance Is Preempted Under *Garmon*

The NLRA preempts state resolution of issues committed to the exclusive jurisdiction of the National Labor Relations Board. *Garmon*, 359 U.S. 236. "Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience." *Id.* at 242. In granting the NLRB primary jurisdiction, "Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies." *Id.* at 242–43. *Garmon* preemption is "'intended to preclude state interference with the [NLRB's]

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interpretation and active enforcement of the integrated scheme of regulation established by the NLRA.'" *Idaho Bldg. & Constr. Trades Council, AFL-CIO v. Inland Pac. Chapter of Associated Builders & Contractors, Inc.*, 801 F.3d 950, 956 (9th Cir. 2015).

Here, the Ordinance is preempted because it requires local officials and state courts to decide whether for-hire drivers are "employees" under the NLRA. *See Marine Eng'rs Beneficial Ass'n v. Interlake S.S. Co.*, 370 U.S. 173, 177–85 (1962) (NLRB has exclusive jurisdiction over whether individuals are "supervisors" or "employees"); *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261, 1274 (9th Cir. 1994) (question of whether workers are agricultural laborers or employees preempted). The Ordinance does not apply to "employees"; it applies only to independent contractors. *See* Ordinance § 6. To decide whether a driver coordinator has complied with the Ordinance's provisions, the Director must decide whether the drivers at issue are "employees" exempt from the Ordinance's coverage, or whether they are independent contractors within its scope. *See* § 6; § 3(M). As the Director's determination is subject to judicial review in the state courts, *id.* § 3(M), those courts ultimately will be required to decide whether for-hire drivers are employees subject to the NLRA.

The NLRB has not resolved the employee status of for-hire drivers, and that issue is currently pending before the NLRB. *See* Steger Decl. ¶ 14; Kelsay Decl. ¶ 8. The Ordinance is therefore preempted because it injects municipal officials and state courts into matters subject to the NLRB's exclusive jurisdiction before the NLRB has resolved the question. *See Marine Eng'rs Beneficial Ass'n*, 370 U.S. at 185 ("The need for protecting the exclusivity of NLRB jurisdiction is obviously greatest when the precise issue brought before a court is in the process of litigation through procedures originating in the Board. While the Board's decision is not the last word, it must assuredly be the first.").[3]

[3] The Ordinance is also preempted by the Washington Public Records Act, RCW 19.56.070(1), which prohibits disclosure of public records containing trade secrets, because the City's use of the driver lists as public records to implement its Ordinance conflicts with the purpose of the statute.

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II. ABSENT AN INJUNCTION, IRREPARABLE INJURY IS LIKELY

Absent preliminary relief, the Chamber's members are certain to suffer irreparable injury in five ways. *First*, "the deprivation of constitutional rights unquestionably constitutes irreparable injury." *Rodriguez v. Robbins*, 715 F.3d 1127, 1144–45 (9th Cir. 2013). The government thus causes irreparable injury when it subjects a business to regulations "which are likely unconstitutional because they are preempted." *Am. Trucking Assn's., Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058 (9th Cir. 2009).

Second, the disclosure of proprietary driver information constitutes irreparable injury. Compelled disclosure of confidential information, whether in the form of a trade secret or otherwise, constitutes irreparable harm because, once disclosed, the status quo can never be restored. *N. Atl. Instruments, Inc. v. Haber*, 188 F.3d 38, 49 (2d Cir. 1999). As this Court has explained, a threat to disclose confidential information "will almost always certainly show irreparable harm." *Pac. Aero. & Elecs., Inc. v. Taylor*, 295 F. Supp. 2d 1188, 1198 (E.D. Wash. 2003). Relief is therefore routinely granted to prevent such disclosure. *See, e.g., HHS v. Alley*, 556 U.S. 1149 (2009) (FOIA disclosure); *Bimbo Bakeries USA, Inc. v. Botticella*, 613 F.3d 102 (3d Cir. 2010) (trade secret). The Chamber's members maintain the confidentiality of their driver information, and disclosure threatens grave harm to their businesses. Kelsay Decl. ¶13–17; Steger Decl. ¶17; Takar Decl. ¶12. As Lyft has explained, if driver data were disclosed, "competitors could and would seek to undermine Lyft's business relationships with its drivers," and would use the information "to gain competitive insight into the strategy and efficacy of Lyft's marketing activity, tactical growth, and long-term strategic plans." Kelsay Decl. ¶15. And even if the Teamsters attempts to keep this information secure, its possession increases the risk of accidental disclosure, intentional misuse by employees, and hacking by outside groups, especially given that it is seeking driver information from every driver coordinator in Seattle.

Third, disclosure of the driver lists triggers the union election process, during which the Teamsters will attempt to unionize drivers in violation of federal antitrust and labor law. As a

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consequence of this disruptive and burdensome process, the Chamber's members will have to spend resources educating drivers about the consequences of voting for union representation—resources that cannot be recovered through a damages action. Steger Decl. ¶ 20. If disclosure occurs, the unlawful election process is certain to occur, and certain to cause irreparable harm.

Fourth, Chamber members are incurring substantial and growing compliance costs. Kelsay Decl. ¶18–20; Steger Decl. ¶18–20. These costs defy precise measurement and will be unrecoverable from the City through compensatory damages. *Fifth*, forced compliance with the Ordinance will threaten the very existence of Chamber members in Washington by "disrupt[ing] and change[ing]" the business of driver coordinators "in ways that most likely cannot be compensated with damages." *Am. Trucking*, 559 F.3d at 1058. Uber and Lyft have created an innovative business model that depends on partnering with independent contractors. The Ordinance will severely disrupt the relationship between Chamber members and independent contractor partners, impacting driver retention, rider service, safety, and reputation, and requiring seismic changes to the businesses that the business models may fail to withstand.

III. THE BALANCE OF HARDSHIPS SHARPLY FAVORS THE CHAMBER

There is no countervailing risk of harm to any other party that outweighs these irreparable harms. The government "cannot suffer harm from an injunction that merely ends an unlawful practice." *Rodriquez*, 715 F.3d at 1145. And, in any event, the City faces no economic harm from an injunction: far from causing the City to restructure its organization, an injunction will merely require the city to delay implementation of the Ordinance pending resolution of this suit. In fact, an injunction will benefit the City by saving it from expending resources on implementing a law that will likely be struck down. Further, the "basic function of a preliminary injunction is to preserve the status quo pending a determination of the action on the merits." *Chalk v. United States Dist. Ct.*, 840 F.2d 701, 704 (9th Cir. 1988). While the City seeks to upend the status quo by implementing the Ordinance and altering the labor relationships of the Chamber's members, the Chamber merely seeks "to preserve" the status quo, a fact that

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"strengthens" its position, *Rodde v. Bonta*, 357 F.3d 988, 999 n.14 (9th Cir. 2004), especially given the City's prior successful efforts to foreclose earlier judicial consideration.

IV. THE PUBLIC INTEREST SUPPORTS AN INJUNCTION

The public interest also favors an injunction, as the public always has an interest in preventing the state from violating federal law, *see Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013), and in preventing the violation of a party's constitutional rights, *see Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). Moreover, there plainly is no public interest in the Ordinance's immediate implementation, as the Ordinance itself deferred implementation for six to eight months, *see* Ordinance § 3, and the City delayed it even further. Also, collective bargaining will likely increase the costs of business for driver coordinators, which could cause those businesses to contract with fewer drivers, resulting in fewer jobs. The Ordinance may also force many drivers to unionize against their will because the City has strictly limited those who can vote for a QDR, while requiring all drivers to be represented by an elected EDR and abide by the contract it negotiates. Ordinance § 3(F)(2). Ultimately, the implementation of the Ordinance threatens the ability of driver coordinators to operate in Seattle and western Washington, eliminating the extensive public benefits brought by these companies.

V. THE "SERIOUS QUESTIONS" TEST WARRANTS PRELIMINARY RELIEF

If the balance of hardships tips sharply in the plaintiff's favor, then "serious questions going to the merits," rather than a likelihood of success on the merits, is sufficient to warrant relief. *See Wild Rockies*, 632 F.3d at 1135. Here, the balance of hardships does tilt sharply in the Chamber's favor, *see supra* Part III, and there are, at a minimum, serious questions going to the merits, *see supra* Part I. The Chamber is therefore entitled to preliminary relief.

CONCLUSION

The Court should grant the Chamber's motion for a TRO or preliminary injunction.

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Respectfully submitted,

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